which the railroad is able to give, lies at the bottom of such prescriptive rights.

On principle, there seems to be no reason for exempting the railroad. Although it has many public duties to perform, yet it is strictly a private corporation formed by voluntary agreement, and operated for private gain. In no regard is it a public corporation. *Mt. Hope Cemetery Co.* v. *Boston*, 158 Mass. 509, 521. But more than that, the policy underlying the exemption does not apply. Government lands are so scattered that, with the best of officials, it is hard to keep track of them and to act promptly against adverse holders. But the land of a railroad is always within the easy reach and control of its officials, and the policy of the Statute of Limitations, that of quieting and securing titles, applies as strongly in their case as in any. As authority has not already extended the rule of exemption to railroad land, it is doubtful if the principal case will be followed.

CONTRACTS OF SEPARATION BETWEEN HUSBAND AND WIFE. — Decisions regarding the validity of separation agreements between husband and wife, being grounded on public policy, have in the past been almost as various as private opinions of what public policy should demand. England has at last adopted the liberal doctrine that agreements looking to an immediate or past separation are not only valid, but the mere promise to live apart forms good consideration and will be specifically enforced. *Besant* v. *Wood*, 12 Ch. Div. 605. In America the promise to live apart has been generally held contrary to public policy. Yet it has not invalidated a transaction having for its purpose an immediate separation or the continuance of one already consummated, as distinguished from one distant or contingent, provided there has appeared other good consideration. *Randell* v. *Randell*, 37 Mich. 563; *Hutton* v. *Hutton*, 3 Pa. St. 100. A recent case shows a tendency to make the American rule even more rigid. *Baum* v. *Baum*, 85 N. W. Rep. 122 (Wis.). The plaintiff agreed to live apart from her husband in consideration of his promise to assign to her certain life insurance policies. Upon the ground that all separation agreements are void unless the parties have already separated, it was held that the husband's promise could not be enforced. The decision might well be supported on the ground that the wife's only consideration was the void promise to live apart, but the contract was treated as the ordinary one for separation containing other good consideration. The English common law the court regarded as in accord with its view, until reversed during the present century. But although this idea is somewhat general, because it was the view of the ecclesiastical courts, the truth is that neither equity nor law regarded the condition of separation as voiding an otherwise valid agreement. *Gawden* v. *Draper*, 2 Vent. 217; *Rex* v. *Mead*, 1 Burr. 542; *Rodney* v. *Chambers*, 2 East 283. Owing to the wife's inability to contract in her own name such agreements were formerly carried out through the intervention of third parties. But this disability having been removed, she should be as competent as a stranger to enter into the agreement. *Sweet* v. *Sweet*, [1895] 1 Q. B. 12. The broad disapproval of contracts providing for an immediate separation, expressed by the court in the principal case, is, then, contrary both to the old common law and to the generally accepted American doctrine.

The general American view, admitting the validity of agreements con-

taining stipulations for separation, though such stipulations themselves are not enforceable, seems the wisest. As long as married people are allowed to live apart by mutual consent, it is a just rule which permits the husband to bind himself, in such circumstances, to support the wife. The law, to be sure, decrees and arranges for separation when it finds cause, but it must be admitted that the parties, if determined upon a separation, can in practice always show adequate cause, and that of this they are in truth the best and final judges. Therefore, when a separation is agreed upon, if it can be quietly arranged out of court, the results seem preferable to those necessarily attendant on the notoriety and scandal of a judicial separation. Public policy certainly demands that marriage itself be not so easily dissolved that it shall come to be lightly entered upon. But in giving effect to separation agreements between parties determined on living apart, the courts in no wise lighten the marriage bonds. They prohibit neither subsequent agreements to live together, nor do they go to the objectionable extreme of the English view by prohibiting attempts of one party to join the other, but merely make valid the husband's agreement to fulfil his marital duty of supporting his wife.

REMEDIES FOR BREACH OF WARRANTY. — Two classes of remedies are almost universally granted in case of breach of warranty; one, in the nature of recoupment, by showing the inferiority of the goods in mitigation of damages, when suit is brought on the contract of sale, *Poulton* v. *Lattimore*, 9 B. & C. 259; the other, a recovery on the warranty itself, either in the form of an independent action, or by means of a counterclaim. *Mondel* v. *Steel*, 8 M. & W. 858; *Underwood* v. *Wolff*, 131 Ill. 425. As the latter remedy includes the former, recoupment is to-day of little practical value except in a few cases, where, through a technicality of pleading, the right to counterclaim has been lost.

A third remedy is available in some jurisdictions — the right to rescind if the goods prove inferior. *Bryant* v. *Isburgh*, 79 Mass. 607. This right is denied in the English courts and in many of the states. 14 HARVARD LAW REVIEW, 327, n. 3. The English rule is followed in a recent Connecticut case where a manufacturer, in fulfilment of an order, sold a machine of the description given, which failed to do properly the work for which it was constructed. *Worcester Manufacturing Co.* v. *Waterbury Brass Co.*, 48 Atl. Rep. 422. It was held that the delivery and acceptance of the machine constituted a waiver of any right to return the goods because of their inferior quality. Inasmuch as the defect in such a case is not discoverable until after delivery and acceptance, this is substantially a denial of the right to rescind.

The English rule is much confused by the distinction attempted between a condition and a warranty. A purchaser may regard a stipulation in a contract of sale as a condition, justifying rescission before he accepts the goods, but after acceptance he can treat the breach of the condition only as a breach of warranty, which is not sufficient ground for repudiating the contract. Sales of Goods Act, § 11, 5, 1. The theory is that after receipt of the goods the buyer, by retaining them, has derived some benefit, and cannot therefore restore the seller to his original position. *Street* v. *Blay*, 2 B. & Ad. 456. Such a tender regard for the seller, who has violated his contract by furnishing an inferior article, seems unjust.